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Chairman: Mr. ESCOVAR SALOM (Venezuela)

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AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued) (A/51/10 and Corr.1, A/51/332 and Corr.1, A/51/358 and Add.1 and A/51/365)

1. Mr. CANDIOTI (Argentina) said that, as was pointed out in the conclusions of the report of the International Law Commission, to decide what methods would enhance the progressive development and codification of international law required one to take a view of the present scope for progressive development and codification, after nearly 50 years of work by the Commission. In that regard, despite the changes that had occurred in international law and organization since the Commission's creation, there was important continuing value in an orderly process of codification and progressive development. Moreover, the Commission could and should continue to play an important role in the creation of a more just world order. The Commission had been created shortly after the Second World War on the understanding that the promotion of international law was a basic precondition for international peace and security and for cooperation among nations. The Commission had responded to that challenge by offering States a number of several solid foundations for the promotion of juridical security through successful codification projects. The Commission had rightly understood that its mandate was not limited to the mere compilation of existing law and had therefore undertaken an ongoing process of innovation, renewal and modernization of prevailing norms within the framework of the progressive development of international law. As the Commission noted, the distinction between codification and progressive development was difficult if not impossible to draw in practice, as the two concepts had become virtually indissociable. However, it did not seem appropriate to eliminate that distinction from its Statute, as the Commission proposed. The two concepts, which were enshrined in the Charter, continued to evoke a fundamental difference between simply reviewing existing norms and taking the modernizing approach of choosing among the various alternatives for future norms.

2. In the light of the experience gained in the codification field over the past 50 years, it should be recognized that, in order to be effective, the codification process must meet the following requirements: drafts must not be the product of drafting work done by the Commission's members in isolation, but must be backed up by States' permanent commitment to the Commission's work; the choice of topics to be considered by the Commission must be realistic and respond to the priority needs of the international community; and topics must concern areas on which there was a minimum consensus in favour of codification, and which were not controversial. The acceptability of a draft convention depended on the proposition of customary norms included in it, which did not mean ruling out their progressive development, however. In that connection, States must see draft codes not as something divorced from their day-to-day reality but as useful and necessary tools for enhancing that reality and improving their population's living conditions. Otherwise, the Commission's drafts would lack the government support necessary for their adoption at the national level. For that reason, it was important that channels of communication be established with Governments, since dialogue, coordination and consultation were the road to cooperation and to the establishment of legal norms that reflected common values shared by all members of the international

community. He welcomed the Commission's recommendations for enhancing its relationship with the Sixth Committee, which might require shortening the time allocated to consideration of the Commission's report and to the general debate in order to permit an informal exchange of views on the principal problems and questions posed by the Commission's work. Lastly, he supported the Austrian delegation's suggestion that the interaction between Governments and the Commission should be strengthened.

3. Mr. NGUYEN DUY CHIEN (Viet Nam) expressed appreciation to the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law for having submitted to the Sixth Committee a set of draft articles dealing with different aspects of the issue. The draft articles provided the necessary framework for the completion of work on that complex topic. He drew particular attention to draft article 4, which emphasized the necessity of preventive action, and draft article 17, dealing with consultations on preventive measures.

4. Concerning the topic of reservations to treaties, it was necessary to bear in mind that the principle of consensus was the backbone of the treaty-making process. It meant that States were entitled to formulate reservations to multilateral treaties to which they intended to become parties, subject to the conditions laid down in the corresponding treaty. If there were no such provisions in the treaty in question, reservations should be made in accordance with the 1969 Vienna Convention on the Law of Treaties. The practice of allowing reservations had opened the door to wider acceptance of multilateral treaties by States. It was necessary therefore to preserve the achievements of the 1969, 1978 and 1986 Vienna Conventions. Moreover, as many delegations had pointed out, there were no convincing reasons to justify a separate reservations regime for some types of treaties. There should be one reservations regime for all treaties and the permissibility of reservations to a treaty should be decided by the States parties to that treaty.

5. With regard to the Commission's future work, he expressed support for splitting the Commission's annual session into two parts, one to be held in New York and the other in Geneva.

6. Mr. SIDI ABED (Algeria), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that there was no justification for the Commission's having chosen, in keeping with the minimalist approach, to include only five crimes. Important offenses had been omitted. The idea of restricting the content ratione materiae of the draft Code, at least provisionally, along the lines indicated in paragraph 41 of the Commission's 1995 report had been abandoned for dubious juridical and political reasons. For instance, the exclusion of the crime of terrorism could only have been due to political considerations. Furthermore, it did not seem appropriate to include crimes against United Nations and associated personnel in the category of crimes against the peace and security of mankind when other crimes whose seriousness and international character were not in doubt, such as terrorism, had been excluded. The draft Code should also include as crimes certain acts of terrorism which constituted a threat to the peace and security of mankind, thereby providing a useful benchmark for the work of the Preparatory Committee on the Establishment of an International Criminal Court.

7. With regard to the topic of State responsibility, the concept of crime by a State raised questions. To distinguish between crimes and delicts within the scope of the international responsibility of States was warranted, since the two types of offenses differed in nature. Both involved unlawful conduct on the part of a State, although their nature and gravity varied greatly. For that reason, wrongful acts should be ranked in a hierarchy. There were particularly serious offenses which could surely be regarded as crimes, such as aggression, slavery, apartheid and any act constituting a serious and systematic threat to the fundamental rights of the human being. Such crimes evoked the concept of jus cogens, i.e., peremptory norms of general international law, despite the legal uncertainties to which a precise definition of such crimes might give rise.

8. As to practical means of imputing responsibility to States for wrongful acts, that was a difficult and complex issue because of its political implications. In that context, he was opposed to conferring on the Security Council any powers beyond those strictly provided for in the Charter of the United Nations.

9. With regard to countermeasures, the aims should be threefold: to avoid an escalation of measures and countermeasures, to avoid aggravating the existing inequalities between States to the benefit of stronger States, and to establish conditions relating to resort to countermeasures in the event that they could not be prohibited.

10. Concerning the topic of international liability for injurious consequences arising out of acts not prohibited by international law, a convergence of views appeared to be emerging on how to approach the topic. The aim was to formulate clear definitions of preventive measures and to develop rules governing compensation for damage based on the "polluter pays" principle.

11. With regard to the future work of the Commission, its workload should not be increased arbitrarily to the detriment of the topics already under consideration. The long-term programme of work should include topics which could be the subject of consensus and which genuinely met the current and future needs of the international community. The Commission had an obligation to respond to the needs of the international community and to develop legal norms that would not be superseded with the passage of time. The long cold war era, which had been so unfortunate for mankind in many ways, had paradoxically given rise to a proliferation of international legal instruments designed not so much to spur the dynamic growth of the international community as to establish specific rules for regulating manifestations of the relationship of forces. The current transitional period should once again enable international law to fulfil its noble function of regulating peaceful coexistence and cooperation among States.

12. Mr. BIGGAR (Ireland), referring to chapter VII of the Commission's report entitled "Other decisions and conclusions of the Commission", concurred with the following statement in paragraph 148: "To decide what methods will enhance the progressive development and codification of international law requires one to take a view of the present scope for progressive development and codification, after nearly 50 years of work by the Commission." He also agreed that the

distinction between codification and progressive development was difficult to draw.

13. Turning to paragraph 149 of the report, he was not entirely convinced by the argument that the Commission's report should be shorter and more thematic. In particular, he was concerned at the suggestion that the information and analysis provided should be reduced considerably in the interest of greater concision; he failed to see how that would contribute to a better structuring of the debate on the report in the Sixth Committee. There might well be occasions on which the task of a special rapporteur would be facilitated by the assistance of a consultative group composed of members of the Commission. Nevertheless, the creation of such groups should not hinder the freedom of the special rapporteurs as to both the content and the presentation of their recommendations. It was important for institutions to take stock of their activities from time to time and to be receptive to constructive criticism. In that context, it would seem appropriate to consider the consolidation and updating of the Commission's Statute on the occasion of its fiftieth anniversary in 1999.

14. Annex II of the report mentioned three possible future topics, namely, diplomatic protection, ownership and protection of wrecks beyond the limits of national maritime jurisdiction and unilateral acts of States. Those topics could be included in the long-term programme of work of the Commission so long as they did not exclude other alternatives. Consideration should also be given to the inclusion of other topics, such as the rules of law pertaining to the protection of the environment and the peaceful uses of outer space.

15. Paragraph 176 of the report stated that there had never been a woman member of the Commission. He recalled that the Charter of the United Nations reaffirmed faith in the equal rights of men and women and that such equality was also embodied in the Universal Declaration of Human Rights, the International Covenants on Human Rights and many other international human rights instruments. He therefore urged governments to rectify that situation by nominating candidates. For its part, the Commission should avoid the unintentional use of terms conveying a gender bias.

16. Mr. BAKER (Israel) shared the view expressed by the Commission as to the difficulty of distinguishing between codification and progressive development of international law, especially in an era in which the development of international law took place in specialized spheres through the activities of various institutions, the regionalization of the handling of specific issues and an increase in law-making bodies, whether private or official, formal or informal. In one way or another, all those elements influenced the formulation and systematization of existing rules of international law and the topics requiring development and regulation. For instance, while the law of treaties had been codified in various conventions, such as the Vienna Convention of 1969, the Commission sought to clarify questions regarding reservations that had arisen since then. It was unclear whether that process involved recodification or progressive development (post codification), but what was clear was that the job needed to be done.

17. In one vital sphere, Israel's problems vis-à-vis the Commission's procedures and working methods differed from those of other States. According

to its statute, the members of the Commission were elected, not on the basis of political representation, but so as to represent the main forms of civilization and principal legal systems of the world, in addition to which its members must of course individually possess the requisite qualifications of competence in international law. However, neither of those factors permitted Israel, which was not a member of a regional group, to nominate a candidate for election. He therefore felt that the functioning of the Commission had some deficiency in that its composition could not be determined in the manner set forth in article 3 of its statute. Ever since the election process had been geared to the regional grouping system, as prescribed in amended article 9 of its Statute, States that were not members of a regional group had been denied the right to nominate a candidate. Thus, Israel could not accept the statement made in paragraph 175 of the Commission's report (A/51/10) according to which the existence of regional groups for the purposes of election "assists in assuring the representativeness of the Commission as a whole". That statement could not be considered accurate until "representativeness" by every State was recognized and rendered possible by the Commission's statute.

18. His delegation agreed with the recommendation that special rapporteurs should be asked to work with a consultative group of members of the Commission (para. 149 (g)), a proposal that would make it possible to maintain the general direction of the specific topic as intended in the initial proposal or request to the Commission.

19. As to the interrelationship between the Commission and the Sixth Committee, it was a vital component of the functioning of the Commission which must be improved and rendered more effective. The Commission clearly needed the input of the Sixth Committee, and that input should be as constructive as possible, whether through responses to questionnaires, through written comments by Governments or through oral comments on the Commission's annual report. However, that oral process must be more structured. Rather than continuing the current practice of making general statements, which in any event were then forwarded in writing to the Commission, it would be preferable to take advantage of the presence of the Chairman and of the Special Rapporteurs of the Commission in order to engage in a more structured, dynamic and direct dialogue and discussion with them.

20. As to the long-term programme of work, Israel considered that the study on diplomatic protection was the most important topic and one that the Commission might take up.

21. Ms. WILLSON (United States of America) said that international circumstances and the needs and problems of international law were currently very different from those that had existed when the Commission had begun its work, for the basic legal structures for inter-State relations now existed. Many institutions and tribunals applied the norms of international law and generated new ones, and the system of international law reached into new fields, creating a risk of fragmentation of the law and posing basic questions.

22. The work of the Commission would be of little use if States were not influenced by it. Thus, the Commission and the Sixth Committee must carefully consider the former's workings and work programme. Many of the suggestions included in the Commission's report made good sense. For the most part they

involved changes that the Commission could implement on its own authority and regarding which it was perhaps not appropriate for Governments to comment in detail. The United States considered the suggestions regarding the roles of the Special Rapporteurs, the Drafting Committee and the working groups, and on the utility of occasional indicative votes, to be sound. It also commended the decision to tailor the length of the 1997 session to the volume of work to be done, and awaited with interest the outcome of the proposed experiment to divide the 1998 session into two parts.

23. As to the Commission's future work, Governments must give better guidance in that regard. The United States would give that matter greater attention and would seek the advice of the experts on the Secretary of State's Advisory Committee on Public International Law. Two of the three topics proposed in paragraph 249 of the Commission's report - diplomatic protection and unilateral acts of States - should be of interest. With respect to diplomatic protection, the United States had already submitted detailed written comments, in which it had suggested that the Commission should begin its work with a study prepared by a special rapporteur for consideration by the Commission and by Governments; decisions regarding any further work could then be made in the light of the conclusions of that study. Her delegation saw no need to draft a convention in that area at the current stage.

24. As to the topic of the international legal consequences of unilateral acts, it was of practical importance, in view of the legal uncertainty prevailing, and accordingly a well-defined study describing the current state of the law would be of value. There again, the final objective should not be a convention.

25. Lastly, with respect to work on ownership and protection of wrecks beyond the limits of national maritime jurisdiction, the topic seemed somewhat obscure and narrow, and it was also being studied in other bodies, including the International Maritime Organization (IMO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO); she therefore urged the Commission to reconsider its suggestion on that topic in the light of the work under way in other forums.

26. Mr. BENÍTEZ SAENZ (Uruguay), referring to chapter III of the report of the Commission, on State responsibility, said that the distinction drawn in article 19 between crimes and delicts was one whose conceptual basis had been debated at great length in the Commission and one that was recognized by the International Court of Justice, which distinguished between the obligations of States vis-à-vis the international community as a whole and their obligations solely vis-à-vis other States. That was a sound distinction, but one that could be still further clarified in the text under consideration. As for the limitative enumeration of crimes, after the advisory opinion of the International Court of Justice, provision should be made for inclusion of the use of nuclear devices affecting the environment. With regard to the countermeasures proposed, the mechanism had been considerably improved, but it did not seem a positive move to limit them to so-called reciprocal countermeasures, since they were detrimental to the right of the injured State. As for the settlement of disputes, the graduated solutions contained in articles 54, 55 and 56 were to be welcomed, but the task of the Conciliation Commission, set forth in annex I, would perhaps prove a futile attempt to find a solution to the conflict of interests that had arisen. A dispute settlement

procedure that culminated in the International Court of Justice could be reliable and practical, reaffirming the role of the existing jurisdictional bodies and avoiding a proliferation of new bodies that was sometimes the subject of criticism.

27. As for chapter IV (State succession and its impact on the nationality of natural and legal persons), the working method proposed by the Commission was sound, requiring separate consideration of the questions of natural and of legal persons, which reflected an ethical and legal distinction that must be maintained in order to make for more thorough analysis of the topic.

28. Concerning chapter V (International liability for injurious consequences arising out of acts not prohibited by international law), he supported the principle embodied in draft article 1, subparagraph (b), namely, that the draft articles should apply to activities not prohibited by international law which, de facto, caused significant transboundary harm, even when they did not involve a risk at the time that they were carried out. Technological advances and people's constant urge to leave the realm of the known for the unknown made it advisable for some limit to exist and for the party which had caused the harm to incur objective liability. It did not seem appropriate to establish a regime of preventive intervention between States but a broad and effective regime of a posteriori liability should exist. The inclusion of a list of activities or substances in draft article 1 might limit the scope of the concept of liability to some extent.

29. Concerning the long-term programme of work of the International Law Commission (chap. VII, sect. A (2.)), the three topics mentioned in paragraph 249 of the Commission's report - diplomatic protection; ownership of wrecks; and unilateral acts of States - should be topics of study, although he did not agree with the views outlined in note 9 of addendum 2 of the annexes, since the jurisdiction of the coastal State beyond its territorial sea and contiguous zone was guaranteed by the residual competence granted to it under the 1982 United Nations Convention on the Law of the Sea.

30. Mr. DE SARAM (Sri Lanka) said that the work of the Sixth Committee, the Commission and the Office of Legal Affairs of the United Nations Secretariat must be adapted to the framework established in Article 2, paragraph 7, of the Charter of the United Nations. The objective must be for all States, regardless of their legal infrastructure, to participate in the elaboration of norms. There was no point in concluding a convention rapidly, only for States to formulate reservations afterward. Therefore, ways and means of improving the methods of work of the Commission and the Sixth Committee and the contribution of the Office of Legal Affairs should be reviewed annually.

31. Moreover, the primary role of the Commission was to advise the Sixth Committee on what the existing law was, when that law was clear and when it began to move into realms of uncertainty. On more than one occasion, the Commission had not informed the Sixth Committee of its interpretation of the law, which had caused a tremendous waste of time. For example, he mentioned the topic of State responsibility, on which there were differing views; if the Commission could not proceed because of differing views, it should so advise the Sixth Committee. It might be best to leave the solution of such questions to the international judicial authorities or arbitral tribunals.

32. Lastly, while it was important to seek a consensus, and the Commission had achieved one on extremely thorny issues, when that search became prolonged, it would be better for the Sixth Committee and for Governments if the Commission proposed possible alternative formulations.

33. In general, it was to be hoped that there could be a swifter and more dynamic relationship among the four factors whose activities could help to bring about progress in the consideration of international legal issues: the Commission, the Sixth Committee, Governments and the Office of Legal Affairs of the Secretariat.

34. Ms. GAO Yanping (China) welcomed the Commission's speedy response to the request made by the General Assembly in paragraph 9 of its resolution 50/45 of 11 December 1995. Chapter VII of the Commission's report contained concrete and substantive views which covered all relevant items for the Commission's long-term programme of work and valuable suggestions for the improvement of its work.

35. Concerning the codification and progressive development of international law, the Commission suggested that in a future revision of its Statute the procedures of codification and progressive development should be merged. She recognized that, at times, it might be impossible to separate the two aspects completely; nonetheless, in drafting instruments purely for purposes of codification, a clear distinction should be drawn made between those norms which comprised a current law (lex lata) and those which were formulated with a view to progressive development (de lege ferenda). Otherwise, the entire instrument would lose its value.

36. The selection of topics for consideration by the International Law Commission should reflect the needs of States and of the development of international relations. Since that was how it had generally functioned, the Commission had been able to elaborate conventions in fundamental areas of international law which had played a vital role in international relations. Nonetheless, the scope of traditional codification was gradually narrowing. Some highly political topics, such as the non-use of force, non-interference in internal affairs or self-determination, were not appropriate for consideration by an expert body. Certain special areas, such as the law of the sea, and the laws relating to outer space, aviation and trade, were addressed by conferences and specialized agencies. Therefore, in order to select topics that met the needs of codification and progressive development of international law and that could be accepted by States, it was necessary to strengthen dialogue between Governments and the Commission. The Commission needed further guidance from the Sixth Committee and the General Assembly.

37. The list of topics contained in the report of the Working Group on the long-term programme of work would assist Governments in better understanding the contribution already made by the Commission and would facilitate the selection of topics. Of course, in addition to accepting the topics proposed by the General Assembly or other organs of the United Nations, the Commission could select topics which it deemed appropriate from its own list and begin its preparatory work, once it had obtained the approval of the General Assembly.

38. Of the three topics which the Commission proposed as appropriate for codification and progressive development, the question of the legal effect of

unilateral acts of States was the most relevant and pressing in the contemporary world and should be considered on a priority basis. Nonetheless, the views of Governments would have to be heard before a decision was taken.

39. The Commission's proposals concerning its working methods were extremely relevant and would help to increase the efficiency of its important work. At the same time, she wished to point out that the Commission's working methods and procedures must conform to its mandate and to the needs of the international community.

40. Mr. POLITI (Italy) welcomed the fact that the Commission had completed the second reading of the draft Code of Crimes against the Peace and Security of Mankind, which marked an historic achievement in the development of international criminal law. The draft Code should not take the form of a convention or declaration of the General Assembly before the completion of the work on the establishment of an international criminal court, in order to avoid duplication of efforts. In order to achieve the greatest possible consistency between the two texts, the draft Code should be one of the fundamental documents considered in the discussions on the Statute for an International Criminal Court.

41. Concerning the substance of the provisions of the Code, his delegation agreed with the Commission's decision to restrict the category of crimes against the peace and security of mankind to so-called "core crimes" generally regarded by the international community as extremely serious offenses. He welcomed the inclusion of the crime of aggression, although perhaps the general definition contained in article 16 was not in conformity with the principle of legality. The inclusion of article 19 was justified, since, under certain circumstances, crimes against United Nations and associated personnel affected the international community as a whole. In the light of State practice and relevant precedents, the definitions of genocide, crimes against humanity and war crimes, which included serious violations of the laws and customs of war committed both in international and non-international armed conflicts, were satisfactory.

42. On the question of punishment, it was appropriate that article 3 should contain only general rules, so that the relevant national jurisdiction or the future international criminal court would be free to determine the scale of penalties and impose a particular penalty in each specific case. Nonetheless, his delegation firmly believed that the code should expressly exclude the application of the death penalty.

43. He agreed with the Commission's recommendations on State succession and its impact on the nationality of natural and legal persons. He thought that special priority should be given to the issue of the nationality of natural persons, and that the first reading of the articles should be completed at the forty-ninth session of the Commission or, at the latest, at the fiftieth session. Although the final decision on the form of the draft articles should be taken at a later stage, the suggestion that they should take the form of a declaration of the General Assembly appeared a sensible one.

44. The topic of reservations to treaties went to the very heart of treaty law. While the relevant principles of the 1969 Vienna Convention on the Law of Treaties should be preserved, there was an urgent need to fill the gaps and

clarify the ambiguities in the existing regime. In that context, the Special Rapporteur had rightly focused his report on the aspect of reservations to human rights conventions. The right balance must be struck between the unitary character of the regime of reservations and the specificity of human rights instruments.

45. Two of the three topics identified by the Commission as suitable for codification and progressive development were clearly suitable for future work, namely, diplomatic protection and unilateral acts of States. In both cases it would be useful to produce draft articles and commentaries. By contrast, the issue of the ownership and protection of wrecks beyond the limits of national maritime jurisdiction was extremely specialized and dealt only with one limited aspect of the law of the sea.

46. His delegation agreed with most of the recommendations to improve the Commission's procedures and methods of work, particularly the suggestions that reports should be shorter and more thematic, that the reports of special rapporteurs should be made available sufficiently in advance of the session and that greater use should be made of working groups. The Sixth Committee, meanwhile, should make a more effective contribution to the work of the Commission, so as to give it clear and specific guidance on the various topics.

47. He also supported the proposal that the Commission should revert to a 10-week session, with a possible extension to 12 weeks if necessary. However, he was opposed to splitting the session into two parts, to be held in Geneva and New York. The advantages of such a split were not clear and did not justify the additional costs it would involve.

48. Mr. Choung Il CHEE (Republic of Korea) said he welcomed the completion of the draft articles on State responsibility, contained in chapter III of the report, and noted that article 19 incorporated Nürnberg law and added the crimes of apartheid and massive pollution of the atmosphere or of the seas (para. 3, subparas. (c) and (d)). His delegation endorsed the inclusion of the latter category of crime, which was in line with the changing structure of international law resulting from industrial and technological development. In that connection, it was worth noting that under article 218 of the 1982 United Nations Convention on the Law of the Sea the port State, rather than the flag State, was responsible for punishing the offence of pollution committed by private vessels on the high seas. Thus, the Convention permitted States other than the flag State to exercise universal jurisdiction to punish the offence of polluting the high seas in the same way as the offence of piracy, which was punishable by all nations as an offence against the law of nations.

49. He noted that although article 34 referred to lawful measures of self-defence, it did not define the concept of self-defence, which was an important topic in international relations, as the principle of self-defence was often invoked by States to justify acts of aggression. Although customary international law on the subject had evolved, no satisfactory solution had been found to the problem of defining that concept. Since armed conflicts and acts of aggression were likely to continue in days to come, it was time for the Commission to study that question and clearly articulate and codify that principle, even though defining the concept of self-defence might prove as difficult as defining the concept of aggression.

50. In article 41, the word "immediately" should be inserted after "to cease", since the continuation of a wrongful act should not be tolerated. Regarding countermeasures (chap. III), the draft articles appeared to assume that States resorting to them were acting on a basis of equality, whereas, as some members of the Commission had pointed out, to do so could lead to unjust results when the States concerned were of unequal strength or means. Adequate safeguards should be provided to prevent great Powers from abusing countermeasures to coerce other States.

51. Regarding the task of the Conciliation Commission, his delegation welcomed the inclusion of a fact-finding function as one of its tasks (art. 57, para. 2). Fact-finding was very important in elucidating the truth with impartiality, which was why any obstacles to the effective functioning of that independent commission should be removed. The phrase "except where exceptional reasons make this impractical" should also be deleted, as it might impede the Conciliation Commission in its fact-finding work in the territory of any party to the dispute.

52. Regarding the topic of State succession, considered in chapter IV of the report, his delegation agreed with the priority given to the issue of the nationality of natural persons, and believed that the most important issues in that area were the right to nationality, deprivation of nationality, the right to choose a nationality in cases of State succession and the principle of non-discrimination. People could not be stripped arbitrarily of the individual right to a nationality, nor could they be forced to take on a nationality against their will. On the question of determining people's nationality, he agreed with the Special Rapporteur that the determining factor should be habitual residence. The survey of State practice showed that the recognition of the right of option had been incorporated in customary international law. It was also correct to separate the topic of natural persons from that of legal persons.

53. With regard to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (annex I to the report), his delegation believed that the State of origin should not be allowed to proceed with a potentially harmful activity when consultations did not lead to an agreed solution (art. 17, para. 3). He therefore proposed that the phrase "and may proceed with the activity at its own risk" should be deleted, since if the State of origin was permitted to proceed with an activity that might cause transboundary harm to another State, it would be the latter State, not the State of origin, which would have to assume the risk of transboundary harm. In that connection, it should be pointed out that it was actually the interests of the State exposed to the dangerous activity which should in principle be protected, not the risk of the State of origin. Similarly, with regard to the equitable balance of interests between the State of origin and the affected State (art. 19), the latter should not be obliged to contribute to the costs of prevention (subpara. (e)), as that would be incompatible with the "polluter pays" principle, unless the contribution was made voluntarily. The victims of the harm should be protected in the first place.

54. With regard to reservations to treaties (chap. VI of the report), he agreed with the conclusion that the Vienna regime was generally applicable to all

treaties, including the human rights instruments. His delegation also supported the draft resolution proposed in the Special Rapporteur's second report.

55. Lastly, in the matter of codification, referred to in chapter VII and annex II of the report, diplomatic protection and unilateral acts of States were suitable topics, but not, for the moment, ownership and protection of wrecks beyond the limits of national maritime jurisdiction. His delegation reserved the right to comment on other issues as the deliberations on the Commission's work progressed.

56. Mrs. CUETO MILIÁN (Cuba) underscored the contemporary importance of the topic of State succession and its impact on the nationality of natural and legal persons, since relations of mutual respect among States depended to a great extent on the proper definition of the rights and obligations relating to succession on the part of the new subjects of international law. The establishment of generally acceptable norms concerning the impact of State succession on the rights of the individual, among them the right to a nationality, based on the principle of non-discrimination, was a sine qua non for the promotion and protection of the fundamental rights and freedoms of the human being. It was crucial to establish an overall process guaranteeing uniform regulation of the consequences of State succession. It would also be very useful to draft an instrument setting out general principles pertaining to all situations and norms applicable to specific situations.

57. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was complex, timely and relevant, with broad scope. Unbridled technological development created new challenges and dilemmas in terms of prevention and liability and required recourse to new forms of compensation and reparation. There was no question that not merely States but also individuals were directly responsible for the consequences of dangerous activities not prohibited by international law, which could in many cases have an impact more deplorable and injurious than that of activities identified as causing transboundary harm. It was therefore necessary to draft and codify general principles guaranteeing that States would assume responsibility for the consequences of any damage caused, following the principle that States had to be liable for whatever occurred within their territories, without prejudice to any concomitant civil liability for an act not prohibited by international law. To that end, it would be extremely useful to study and update the list of controlled substances, as a necessary complement to the progressive development and eventual codification of international environmental law. The Commission's work could serve as a catalyst in that regard.

58. Reservations to international treaties remained a matter of great interest to the international community because they provided an effective and necessary means of guaranteeing the universality of international treaties in an increasingly interdependent yet diverse world, both in terms of political thinking and legal doctrines. Global diversity demanded the flexible reservations regime adopted in the 1969 Vienna Convention on the Law of Treaties and in the subsequent legal instruments on the matter. Reservations to treaties were the expression of a willingness and flexibility to negotiate on the part of sovereign States, which were in agreement about giving precedence over any other doctrinal consideration to the possibility of reconciling international legal

thinking with national bodies of law. To question the reservations procedure designed in the Vienna regime would, far from promoting the universality of treaties, result in an excessive restriction on the admissibility of reservations, the free consent of the parties, and the supplementary nature of reservations, which, in the final analysis, was an expression of the same will of States that was reflected in a balanced way in the literal text of the treaties. The reservations procedure should not be approached from a sectoral standpoint, and it was for the parties alone to analyse and agree, in a treaty regime, on the need for reservations in the form of derogating clauses. The treaty bodies also had no role in the matter, for their function was to monitor the implementation of the provisions of the international instruments, on the basis, however, of the principle of free consent of the parties and a recognition that the parties exercised control over their work.

59. The recommendations regarding the mandate and work of the Commission, found in chapter VII of the report, were an important starting point for efforts to revitalize and strengthen the Commission, whose contribution to the United Nations and to the Sixth Committee was and would continue to be indispensable, regardless of whether States made political decisions in given cases to encourage or impede its work. In that connection, it was necessary to improve the Commission's procedure for preparing reports and its consultative role. The new topics proposed by the Commission should be studied exhaustively, especially diplomatic protection and unilateral acts of States.

60. Mr. SHANMUGA SUNDARAH (India) observed that while the Commission had concluded the first reading of the draft articles on State responsibility, important issues still needed to be resolved, like the legality of countermeasures and the conditions under which they could be taken. Countermeasures could give rise to abuse by powerful States, and therefore clarity and precision were required. A Special Rapporteur had indicated that one way of avoiding abuse was to require recourse to binding third-party settlement of disputes as a precondition for initiating countermeasures. Unfortunately, a different approach had been taken in the draft articles; according to article 47, if initial negotiations failed to produce a solution, the injured State could take countermeasures without prior recourse to third-party settlement of disputes, in which case the State against which the countermeasures were taken could resort to binding arbitration.

61. The terms "international crimes" and "wrongful acts" used in article 19 of the draft articles raised important questions because the legality of countermeasures would be dependent on the nature and scope of such crimes and acts. Therefore, the regime proposed by the Commission as a basis for unilateral countermeasures by States should not be used. India was also opposed to a regime of sanctions, particularly the unilateral measures proposed by the Commission in the case of international crimes. Those methods would be no more than a threat and did not contribute to the maintenance of world peace and justice.

62. Regarding international liability for injurious consequences arising out of acts not prohibited by international law, the Working Group was to be commended for having completed draft articles on the prevention of injurious consequences, on the basis of which the Commission could make progress. He agreed with the Commission that, while States were not precluded from carrying out activities

not prohibited by international law, they must notify the risks of harm involved in any activity undertaken in their territory and offer compensation or other relief for the victims of transboundary harm, reflecting the basic legal principle of sic utere tuo ut alienum non laedas.

63. Jurisdictional control or sovereignty over a territory did not per se constitute a basis for the international liability of States, for what was crucial was the actual control of operations taking place within the territory of a State. Therefore, international liability for transboundary harm must be imputed to the operator who was in direct physical control of the activities.

64. The Commission should focus on specific types of activities as a basis for developing draft articles rather than working in the abstract. It seemed neither necessary nor useful to distinguish between "significant" harm and "serious" or "substantial" harm, since they were interchangeable in practice.

65. With regard to the topic of State succession and its impact on the nationality of natural and legal persons, he believed that the Commission should focus on the practice of States in all regions with regard to change in the conferment of nationality at the time of State succession. The objective should be to avoid statelessness. It might also be relevant to consider the effect of State succession on the nationality of legal persons such as corporations.

66. With regard to the topic of reservations to treaties, he believed that the debate over the Vienna regime should not be reopened. The reality of international relations required that it should be left to States parties to determine the legal value of reservations and declarations and thus the legal relationship between States. Furthermore, the Vienna regime should apply to all treaties, including those relating to human rights.

67. Mr. MONTES de OCA (Mexico), referring to the draft articles on State responsibility, said it was regrettable that the draft maintained the distinction between international delicts and crimes, as that raised many questions. The question of countermeasures was also a subject of controversy. Its inclusion in the draft tended to reinforce the inequalities between States and to provide States which had the capacity to resort to countermeasures with one more means of pressure. The use of countermeasures depended on numerous subjective assessments and posed the risk of increasing tensions between States instead of helping to put an end to unlawful conduct. He was therefore in favour of excluding countermeasures from the draft articles, which should be limited to regulating the consequences of wrongful conduct in terms of reparation, satisfaction, guarantees of non-repetition, cessation of wrongful conduct, restitution in kind and compensation, in addition to general aspects of responsibility and dispute settlement. The Commission should use caution in dealing with acts which, taken in isolation, were contrary to international law, but which could be regarded as legal when viewed as a response to an internationally wrongful act. While the Commission's approach to the question of dispute settlement mechanisms was acceptable, greater emphasis should be placed on judicial proceedings and the exhaustion of judicial remedies should be compulsory for all States parties.

68. With reference to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, the

principle sic utere tuo ut alienum non laedas was fully recognized in international law. In that context, the Commission had not confined itself to recognizing a clear principle, but had sought to promote its implementation. The development of the procedural norms required in order to give effect to that principle reduced the scope for the exercise of discretion by States.

69. With regard to the procedures and working methods of the Commission, he expressed general support for the conclusions and recommendations contained in paragraphs 148 and 149 of the report, and stressed the importance of improving and strengthening the dialogue between the Sixth Committee and the Commission. The Commission needed to receive more guidelines for its work through the timely transmission of comments and information from States. In that context, the yearly consideration by the Sixth Committee of the report of the Commission was an especially appropriate forum, and the availability of reports before the beginning of the session would facilitate that dialogue. For its part, the Commission should give greater emphasis to the comments received.

70. Lastly, with regard to the Commission's long-term programme of work, while supporting the inclusion of the topics of diplomatic protection and unilateral acts of States, he did not believe that it was appropriate to consider the ownership and protection of wrecks beyond the limits of national maritime jurisdiction, as that topic was being considered in other United Nations forums.

71. Mr. SCHELLENBERG (Observer for Switzerland) agreed with the Commission's conclusion that the progressive development and codification of international law should be improved. To that end, the selection of topics was crucial; it was necessary to bear in mind the reality of contemporary international relations and, in each instance, to question the utility of the undertaking so as not to become bogged down in sterile academic debates. He made the following suggestions in order to expedite the work of the Commission and enhance its effectiveness: (1) Some of the topics could be subdivided and entrusted to various special rapporteurs, whose reports could also be more concise; (2) In some areas, the Commission might resort to outsourcing in respect of both participation in the debates and the preparation of reports; despite the logistical problems involved, an increase in "critical mass" would expedite the work, improve its already high quality and yield more authoritative results; (3) A partial solution to the lack of participation by States might be to reduce the frequency of and streamline the questionnaires; (4) Eliminating the need for a second reading of drafts would expedite the work and reduce the burden on States, which would not have to consider them twice; (5) The consideration by the Sixth Committee of the report of the Commission could be structured thematically, with preference being given to completed draft articles. That would facilitate a genuine debate, rather than monologues; (6) The financial arguments in favour of splitting the Commission's session into two parts, to be held in different cities, did not appear to be convincing, nor should they be decisive. The determining factor should be that members of the Commission should be able to work calmly and without interruptions; to that end, a single session held in one place seemed preferable.

72. With regard to the Commission's long-term programme of work, he believed that the topic of diplomatic protection continued to hold substantial practical interest. In that connection, he had the following comments to make: (1) The preconditions for protection (A/51/10, annex I, add.1, sect. 4) did not mention

the 'clean hands' theory; while that theory referred more to international responsibility than to diplomatic protection, it would be useful to give some consideration to it; (2) The scope of the topic should be limited initially to the protection of natural persons, so as not to waste time on issues about which there was great uncertainty; (3) For the same reasons, consideration of the special cases mentioned by the Commission (individuals in service with the State, stateless persons and non-nationals forming a minority in a group of national claimants) should be set aside for the time being.

73. The topic of ownership and protection of wrecks beyond the limits of national maritime jurisdiction, while well delimited, had been virtually untouched by the efforts to establish an international regime, except in the case of archaeological and other historic objects. For that reason, he believed that the Commission had made an excellent choice and that it might be appropriate to expand the scope of the topic to include wrecks within the limits of national maritime zones, which could also pose serious problems, as in the case of State-owned vessels which sank in the territorial waters of other States.

74. The topic of unilateral acts of States, while complex, had been aptly chosen by the Commission; and he had no comments to make in that regard.

75. Mr. MAHIOU (Chairman of the International Law Commission) reaffirmed that the codification process referred to in the Charter was essentially a dialogue between an expert body (the Commission) and a political body (the Sixth Committee and governments) from which the Commission needed guidelines in the initial phase of its work on each topic. At that stage, the Commission could not describe all the details of a topic, which would emerge from a review of State practice, judicial decisions and other relevant materials.

76. Accordingly, the Commission needed input from the Sixth Committee and from governments, at least on the more important issues, such as those listed in its report (A/51/10, chap. I, sect. H, paras. 22-29). It was also important for the largest possible number of States to reply to the questionnaires transmitted to them by the Commission, for example, on the topic of State responsibility. The contribution of governments was particularly important in an era in which international law was evolving more rapidly than ever before.

77. The CHAIRMAN said that the Committee had concluded its consideration of agenda item 146.

The meeting rose at 1 p.m.